



Comptroller General  
of the United States

12831

Washington, D.C. 20548

## Decision

**Matter of:** Brooks Towers, Inc.--Reconsideration

**File:** B-255944.3

**Date:** December 29, 1994

Andrew P. McCallin, Esq., Rothgerber, Appel, Powers & Johnson, for the protester.  
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Request for reconsideration is denied where it is based on evidence which could have been, but was not, submitted by protester in the course of the original protest.

### DECISION

Brooks Towers, Inc. requests reconsideration of our decision Brooks Towers, Inc., B-255944.2, Apr. 28, 1994, 94-1 CPD ¶ 289. In that decision, we denied Brooks Towers's protest of the rejection of its offer under solicitation for offers (SFO) No. 93-16, issued by the General Services Administration (GSA) for the lease of office space for the Office of Surface Mining (OSM) in Denver, Colorado. GSA rejected the offer because the space offered by Brooks Towers did not conform to the floor load requirements of the solicitation. Brooks Towers now argues that the floor load requirements were not material.

We deny the reconsideration request.

The SFO required a minimum 27,115 square feet to a maximum 28,470 square feet of office space, including a 3,000-square-foot library with a minimum floor load capacity of 100 pounds per square foot and a 1,100-square-foot computer room with a minimum floor load capacity of 200 pounds per square foot. Award was to be made to the responsible offeror who submitted the lowest-priced proposal conforming to the requirements of the solicitation.

The agency rejected Brooks Towers's proposal as technically unacceptable because Brooks Towers's floor load capacity of 75 pounds per square foot did not comply with the requirement for a floor load capacity of 100 pounds per square foot for the library and 200 pounds per square foot

for the computer room. Instead of offering to meet the special floor load requirements for the library and computer room, Brooks Towers offered additional floor space beyond that required and proposed that weight be distributed in those rooms so that the floor load capacity of the building would not be exceeded.

In its initial protest, among other things, Brooks Towers argued that its offer of additional space at no additional charge proposed a cost effective solution to accommodate OSM's library and computer needs and would allow OSM to accomplish the intended purpose by spacing heavy loads safely over a larger area.

We found that the agency properly rejected Brooks Towers's proposal because it did not comply with the solicitation's floor load requirements. We also stated that Brooks Towers's protest of the rejection of its alternate method of meeting the agency's requirements--providing additional floor space so that heavy loads could be safely spaced over the larger area--was an untimely challenge to the terms of the SFO.

In its reconsideration request, Brooks Towers alleges that information not previously available shows that the building provided by the awardee, 1999 Broadway Partnership, does not meet the special floor load requirements and, therefore, the floor load requirements were not material. The protester states that after it received our decision on May 10, the firm undertook an investigation to determine if 1999 Broadway was complying with the floor load requirements. Specifically, the protester asked its engineer to examine the drawings which 1999 Broadway submitted with its application for a building permit to reinforce the building's 33rd and 34th floors--the floors to be occupied by OSM. In an affidavit submitted to our Office, the engineer states that "[i]n late May, 1994," he was asked to determine whether the floor structures at 1999 Broadway are capable of meeting the special floor load requirements. On June 8, the engineer checked the public records maintained by the Denver Building Inspection Division. According to the protester's engineer, while the drawings submitted by 1999 Broadway show that a portion of the 33rd floor will be strengthened to achieve a floor load capacity of 125 pounds per square foot and a portion of the 34th floor will be strengthened to achieve a floor loading capacity of 100 pounds per square foot, there was no indication in the drawings that either of those floors had been strengthened to accommodate 200 pounds per square foot, as required by the SFO for the computer room. In his affidavit, the engineer also states that the remaining portions of the 33rd and 34th floors probably have a floor loading capacity of 70 pounds per square foot, the standard floor loading

capacity for office space constructed in 1985, when 1999 Broadway was built. With the affidavit, the protester submitted a copy of a construction permit issued on April 12 to 1999 Broadway for alterations--including reinforcing the floor structure--to the 33rd and 34th floors.

According to Brooks Towers, 1999 Broadway does not meet the special floor load requirements and the agency either disregarded or accepted this noncompliance. Under the circumstances, Brooks Towers argues that the floor load requirements are not material and were never intended to be material requirements of the solicitation. The protester argues that 1999 Broadway is doing exactly as Brooks Towers proposed: providing additional floor space so heavy loads can be spaced safely over the larger area. Because the floor load requirements are not material, Brooks Towers argues that its proposal should not have been rejected as technically unacceptable. The protester argues that it was penalized during the evaluation because it admitted that it could not meet the floor load requirements while 1999 Broadway represented that it could and would meet the floor loading requirements. According to the protester, the floor loading requirements "were a mere pretext for OSM to vacate its office space in the 25-year-old Brooks Towers facility" and move into a newer building.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1994). Information not previously considered means information that was not available to the protester when the initial protest was filed. U.A. Anderson Constr. Co.--Recon., B-244711.2, Jan. 23, 1992, 92-1 CPD ¶ 106. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Id.

In its initial protest, filed December 23, 1993, Brooks Towers stated that "GSA knows that the required 200 pounds per square foot loading is impossible to meet in a high-rise building such as 1999 Broadway, yet it is proceeding with this alternative without verification." In its report on the protest, GSA responded that 1999 Broadway took no exception to the stated floor loading requirements and that the solicitation did not require verification. Brooks Towers failed to rebut the agency response in its comments and, in fact, Brooks Towers's comments did not address the firm's initial contention concerning the floor load capacity

of 1999 Broadway. Under the circumstances, since Brooks Towers abandoned this issue we did not address it in our initial decision.<sup>1</sup>

Nevertheless, although it previously abandoned this issue, in requesting reconsideration, Brooks Towers has once again challenged the awardee's compliance with the floor loading requirements, arguing that the information on which it bases the request was not previously available. The record shows, however, that during the development of the initial protest, Brooks Towers did not seek any information concerning 1999 Broadway. Although the protester states that, in December 1993, it had suspicions that the awardee could not meet the special floor load requirements, it did not ask its engineer to investigate the public records concerning 1999 Broadway until May 1994, 5 months after it knew of the award to 1999 Broadway and 1 month after we denied the protest.<sup>2</sup>

Moreover, the engineer's statement that nonreinforced portions of 1999 Broadway's floor structure probably have a floor loading capacity of only 70 pounds per square foot is not based on information obtained during the June 1994 search. Indeed, we do not see why the engineer's opinion as to 1999 Broadway's floor load capacity could not have been provided to our Office when the protest was first filed, or at the latest, with the firm's comments on the agency report. Our Regulations do not envision a piecemeal presentation of evidence, information, or analysis. RC 27th Ave. Corp.--Recn., B-246727.2, May 20, 1992, 92-1 CPD ¶ 455. Accordingly, we do not reconsider decisions on the basis of previously available information; a protester that fails to submit all relevant information during the initial protest proceedings does so at its own peril. Id.

Here, because Brooks Towers could have--but did not--present evidence concerning 1999 Broadway's compliance with the floor load requirements during the initial protest proceedings, its reconsideration request concerning that issue is untimely and provides no basis for reconsidering

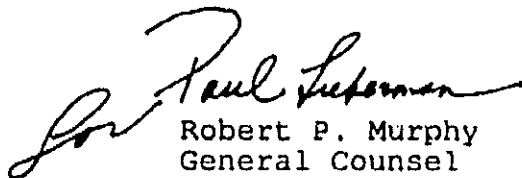
---

<sup>1</sup>Where an agency specifically addresses an issue raised by the protester in its initial protest and the protester fails to rebut the agency response in its comments, we consider the issue to have been abandoned by the protester. Logics, Inc., B-237411, Feb. 1, 1990, 90-1 CPD ¶ 140.

<sup>2</sup>The record shows that 1999 Broadway's application to reinforce the 33rd and 34th floors, which the engineer states is in the "public record," was approved on April 12, more than 1 month before the protester began its investigation.

our prior decision.<sup>3</sup> Palmer Contracting--Recon.,  
B-256461.2, Apr. 29, 1994, 94-1 CPD ¶ 284.

The request for reconsideration is denied.

  
Robert P. Murphy  
General Counsel

---

<sup>3</sup>Brooks Towers argues that its reconsideration request was timely filed because it was filed within 10 working days of receiving the agency's response to Freedom of Information Act (FOIA) request which the firm filed on June 9, 1994. In its FOIA request, Brooks Towers requested documents concerning 1999 Broadway's compliance with the special floor loading requirements. If a protester diligently pursues release of information and then files a protest within 10 working days of the receipt of the data, our timeliness requirements are satisfied. However, that is not the situation here. As noted above, Brooks Towers suspected that 1999 Broadway could not meet the special floor loading requirements at the time it filed its original protest, yet waited over 5 months, until June 9 to submit its FOIA request to GSA. Brooks Towers's delay of more than 5 months does not constitute a diligent pursuit of information. Systems & Processes Eng'g Corp.--Second Request for Recon., B-231420.3, June 30, 1988, 88-1 CPD ¶ 620.